ALUMINIUM INDUSTRIES SDN. BHD.

v.

COOKERMATE (M) SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[COMPANIES WINDING-UP NO. 28-148 OF 1989]
26 FEBRUARY 1990

COMPANY LAW: *Winding-up - Whether unable to pay its debts - Earlier suit in Magistrate's Court - Whether there is judgment debt - Whether petitioner has locus standi.*

EVIDENCE: *Correspondence - "Without prejudice" letters - Whether admissible to prove settlement.*

The petitioner A filed a claim (the said debt) in the Magistrate's Court for goods sold and delivered to C, the respondent company; A sought final judgment under O. 26A of the Subordinate Courts Rules. A subsequently filed a petition for winding-up of C on the ground that C was unable to pay the said debt. C applied for the petition to be struck out on the basis that firstly, there was no judgment debt against C and secondly that A, since it is not a creditor, has no *locus standi* to apply for a winding-up order. The suit in the Magistrate's Court was dismissed as a result of a settlement between the parties, *vide* respondent's letter dated 13 January 1990.

The issues for the Court were whether the letters marked "without prejudice" were admissible and whether C was able to pay the said debt.

Held:

[1] The "without prejudice" letters are admissible to see if there is a *bona fide* dispute or if a settlement had been arrived at between the parties; the evidence shows that the parties had arrived at a settlement in relation to the said debt - *Tomlin v. Standard Telephones and Cables Ltd.* followed.

[2] The respondent was clearly a debtor and the petitioner a creditor; there is a debt which the respondent has yet to settle and A therefore has *locus standi* to present the winding-up petition.

[3] The evidence is overwhelming that the respondent by clear conduct refused to be bound by the earlier settlement arrived at between the parties and has now no intention of settling in accordance with the earlier settlement; instead it is putting a fresh offer. C was therefore unable to pay its debt.

[Order made for winding-up of respondent company.]

Cases referred to:

Jurupakat Sdn. Bhd. v. Kumpulan Good Earth [1973] Sdn. Bhd. [1988] 1 CLJ (Rep) 618
Liew Yin Yin Construction Sdn. Bhd. v. Yata Enterprise Sdn. Bhd. [1989] 3 MLJ 249
Tomlin v. Standard Telephones and Cables Ltd. [1969] 3 All ER 201

Legislation referred to:

Companies (Winding-Up) Rules 1972, r. 7(1)
Evidence Act 1950, s. 126 s. 23
Legal Profession Act, s. 35(b)
Rules of the High Court 1980, O. 1 r. 2, O. 18 r. 19,
Subordinate Courts Rules 1980, O. 26A

For the petitioner - Ong Ban Chai; M/s. Ong Ban Chai & Co., Johore Bahru

For the respondent - B.S. Lim; M/s. Lim Boon Seng, Ipoh Perak

JUDGMENT

Abu Mansor Ali J:

By their petition dated 7 October 1989 (encl. 2) the petitioner applied that the respondent company be wound up on the ground that the company is indebted to the petitioner in the sum of RM13,603.68 for the purchase of goods sold and delivered with interest, the respondent company was unable to pay its debts and in the circumstances it was just and equitable that the company be wound up. The respondent company by their notice of motion dated 28 November 1989 (encl. 13) applied that the petitioner's petition for winding up the respondent company be struck out or dismissed. I heard arguments in respect of the respondent's applications first in that order and I then heard the petitioner's petition for the winding up after which I reserved judgment to a date to be fixed.

The motion for striking out is supported by the affidavit of Lim Choong Chong, the managing director of the respondent company affirmed on 7 November 1989 (encl. 12). He averred that the respondent is not indebted to the petitioner and there is no judgment debt standing against the respondent. He further averred that since the petitioner is not a creditor he is not therefore entitled to apply for a winding up as the petitioner has no *locus standi*.

As regards the petitioner's claim of RM13,603.68 in the Ipoh Magistrate's Court Civil Suit 261 of 1988, the suit was filed by the petitioner on 19 February 1988 the respondent duly filed their defence. On 25 April 1989 the petitioner moved for final judgment under O. 26A of the Subordinate Courts Rules. While the case before the Magistrate's Court was pending, the petitioner filed a petition for winding-up. The respondent said the petitioner served a copy of the petition to the respondent's bankers which took action to stop the respondent's credit facilities. In doing so the respondent says the petitioner was abusing the process of the Court by using the company Court to enforce the dispute. A further development in the Ipoh suit was it was dismissed by the learned Magistrate on 17 January 1990. It was clear from para. 6 of encl. (18) the petitioner filed a notice of discontinuance Exhibit "NCK6" because of a settlement arrived at *vide* the respondent's letter dated 13 January 1990 suggesting payment of RM300 per month.

Applicant's Counsel cited *Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd.* [1988] 1 CLJ (Rep) 618. The applicant objected to the admission of the proposed settlement as they say being against s. 23 and s. 126 of the Evidence Act.

As for the proposition that the petitioner has no *locus standi*, Counsel cited the case of *Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd.* [1988] 1 CLJ (Rep) 618. He also cited *Liew Yin Yin Construction Sdn. Bhd. v. Yata Enterprise Sdn. Bhd.* [1989] 3 MLJ 249, 250 for the proposition that it could not be used as a forum for enforcing disputes.

I must examine the applicant's Counsel's allegation that there is no debt and therefore there is no *locus standi* of the petitioner to present the petition.

At the outset, the petitioner's Counsel submitted that the applicant could not invoke the aid of the Rules of the High Court 1980 particularly O. 18 r. 19 High Court Rules 1980 to strike out the petition since, he says O. 1 r. 2(2) RHC provided the Rules of the High Court have no effect in relations to proceedings in the Winding-up of Companies for which separate specific provision have been made under the Winding-up Rules 1972. Other than reading that relevant order, the petitioner's Counsel had no authority to cite. He assured the Court it is a novel point which has never been taken up before.

I find no substance in the submission of the petitioner's Counsel on this point.

It is clear that the applicant did not resort to O. 18 r. 19 of the Rules of the High Court 1980 which would have been fixed for chambers. The applicant had brought this application under r. 7(1) of the Companies (Winding-up) Rules which provides:

> 7(1) Every application in Court, other than a petition, shall be made by motion and shall be served on the party effected thereby not less than two days before the day named in the notice for hearing of the motion.

I rule against the petitioner on this point.

As regards the applicant's contention that the petitioner has no *locus standi* as there is no debt there is no doubt that I have to look at the petitioner's claim in the Ipoh Magistrate's Court case. The applicant says that the Court could not look at all the letters marked "without prejudice" especially "NCK7" attached to encl. (18) the affidavit of N.C. Kumbhat, financial controller of petitioner's company affirmed on 20 January 1990. In applicant's objection, Lim Choong Chong in para. 3 of his affidavit encl. (17) says:

> 3. The contents of paras. 5, 5.1 and 5.2 (of Kumbhat's affidavit encl. (18) are inadmissible being without prejudice communication between solicitors, and solicitor and client. However, the application under O. 26A of the Subordinate Courts Rules had been dismissed on 17 January 1990. Further, the affidavit of Lim Cho Hock affirmed on 4 May 1989 is also inadmissible being contrary to s. 35(b) of the Legal Profession Act and s. 126 of the Evidence Act 1950.

Mr. Ong Ban Chai for the petitioner maintains that these "without prejudice" letters may be admitted. He cited *Tomlin v. Standard Telephones and Cables Ltd.* [1969] 3 All ER 201 where the "without prejudice" letters between Counsels were admissible as it was not possible to determine without looking at the correspondence whether there was a binding agreement. I agree with the authority in *Tomlin v. Standard Telephones and Cables Ltd.* cited that in order to look and discover whether there was a *bona fide* dispute in the Ipoh Magistrate's Court case or whether it was the case that case had been settled. I rule that all the "without prejudice" letters are admissible to see if there is a *bona fide* dispute or if a settlement had been arrived at between the parties. This I propose to do by going through the affidavit of the parties reading them together with the "without prejudice" letters.

As regards the debt of RM13,603.68 we were referred to paras. 4, 4.1, 4.2 of affidavit, the affidavit of Kumbhat affirmed on 20 January 1990 (encl. 18). I make a finding of fact that the respondent owed the petitioner that sum. Much more important I also make a finding of fact from paras. 5, 5.1, 5.2 of the same affidavit encl. (18) particularly Exhibit "NCK4" the respondent and the petitioner had come to a settlement of the petitioner's claim by the respondent agreeing to pay the petitioner's claim by an instalment of RM500 per month. As a result of the above settlement in para. 6 of affidavit encl. (18) the petitioner filed a notice of discontinuance (see Exhibit "NCK6"). This being my finding, I overrule the applicant's Counsel's objection to petitioner showing that there was a settlement arrived at and likewise I uphold the petitioner's contention that the withdrawal of the action was to enable a winding up action to be taken. I have already made by finding that withdrawal was because the parties had arrived at a settlement.

The question for my decision is, should I allow this application and dismiss the petition? My answer to the motion is that the petitioner has *locus standi* to present a petition. I find the respondent was clearly a debtor and the petitioner a creditor. As the matter clearly stood,

there is a debt which the respondent has yet to settle. The motion must therefore fail as there is locus standi for the petitioner to present the petition. I therefore dismiss the motion with costs to the petitioner to be taxed.

I come now to whether I should grant the petition for winding-up. The authorities point to my exercising my discretion as to whether the respondent should be wound up. The ground relied on by the petitioner in their petition for winding up is that the respondent is unable to pay its debt and it is just and equitable to do so.

In "NCK6" attached to affidavit encl. (18) the notice of discontinuance was signed by the petitioner's solicitors on 9 September 1989. The respondent did not sign the notice although in "NCK4" and in other documents the respondent had in no uncertain terms agreed to pay the debt by RM500 per month instalment. On 9 October 1989 the petitioner filed this petition. In "NCK7" by letter dated the 13 January 1990 the respondent sent the petitioner another letter which in effect negates the agreement arrived earlier and by this letter the respondent applied to pay the petitioner RM7,077 (which sum was exclusive of accrued interest since 11 February 1986) by an instalment of RM300 per month.

The evidence is overwhelming that the respondent by clear conduct refused to be bound by the earlier settlement arrived at between the parties and has now no intention of settling the RM500 per month instalment. He is now instead putting a fresh offer of RM300 per month. It is to be also noted that the instalment of RM500 per month was to have taken effect from 1 May 1989 per para. 6 of the affidavit of plaintiff's Counsel affirmed on 22 April 1989 "NCK4" In spite of the clear terms of settlement, the respondent even at the date of hearing of this application persisted in denying the settlement.

From all these available evidence before me I have no hesitation in finding that the respondent was unable to pay its debt and I make an order in terms for the winding up of the respondent's company with costs to the petitioner to be taxed.

Also found at [1990] 2 CLJ 777